Supreme Court, U.S.
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NO.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1999

AMY KRUGER, ET AL
Petitioner,

VERSUS

GARDEN DISTRICT ASSOCIATION, ET AL
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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55 pp

QUESTIONS PRESENTED

Should the court of appeals have *sua sponte* dismissed petitioners' appeal as moot on account of what it characterized as the state district court's "final judgment", *i.e.*, the declaration contained in the judgment against the defendants of preliminary injunction of the Louisiana Orleans Parish Civil District Court that LSA-R.S. §33:2740.40(c) was unconstitutional, when the judgment was interlocutory, not final, was on a suspensive appeal, and was ultimately vacated and remanded?

Particularly under circumstances in which the interlocutory judgment of the state district court was on appeal, and the subsequently issued mandate of the Louisiana Supreme Court was, "JUDGMENT VACATED IN PART AND TRANSFERRED TO THE COURT OF APPEAL FOR EXPEDITED APPELLATE REVIEW," should the court of appeals have dismissed the appeal as moot or should it have maintained jurisdiction pending the decision of the Louisiana Supreme Court and then, when the judgment of the district court had been vacated, proceeded to the merits of the appeal?

Assuming *arguendo* that the appeal was moot, did the court of appeal deviate from the established jurisprudence of this Court in failing to remand to the district court with instructions to vacate the underlying judgment and, by so doing, prevent any preclusive effect from the federal district court's judgment.

PARTIES TO THIS PROCEEDING

Petitioners are Amy C. Kruger and St. Charles 1, L.L.C. ("Kruger"), plaintiffs in the district court and appellants in the court of appeal.

The respondents is the defendant, the Garden District's Security District, a/k/a the Garden District's Security Special Taxing District ("GDSD"), none of the other defendants having made a timely appearance in the court of appeal.

Also named defendants in the district court were the individual members of the GDSD's Board of Commissioners, the Garden District Association; the Magazine Street Merchants Association, Inc.; the St. Charles Avenue Association; the Mayor of New Orleans, Ms. Betty Jefferson, the Assessor for the 4th District of the City of New Orleans, the City of New Orleans, State Senator Diana Bajoie and State Representative Renee Gill Pratt, and the State of Louisiana.

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Petitioners respectfully petition for a writ of certiorari to review the judgment of the Fifth Circuit Court of Appeals in this case.

OPINIONS BELOW

The decision without reported opinion of the Fifth Circuit (App. A) is table reported at 208 F.3d 1006; 2000 U.S. App. LEXIS 2616 (5th Cir. La. Jan. 20, 2000). The district court opinions (App. C-E) are reported at 1999 U.S. Dist. LEXIS 1482 (E.D. La. Feb. 2, 1999) (App. C); 1999 U.S. Dist. LEXIS 6985 (E.D. La. Apr. 30, 1999) (App D), and 1999 U.S. Dist. LEXIS 7375 (E.D. La. May 12, 1999) (App. E).

GROUNDS FOR JURISDICTION

This Honorable Court has jurisdiction in this cause pursuant to 28 U.S.C. §§ 1254(1), 2101(c). The United States Court of Appeals for the Fifth Circuit rendered the decision below on January 20, 2000 and denied the application for rehearing on March 2, 2000.

STATUTES INVOLVED

The text of LSA-R.S. 33:2740.40, the statute sought to be declared unconstitutional, is set forth in Appendix G.

U.S. Const., Art. IV, § 1 states:

> Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general

Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.

28 U.S.C. § 1738. "State and Territorial statutes and judicial proceedings; full faith and credit" states:

The Acts of legislature of any State, Territory, or Possession of the United States, or copies thereof, shall be authenticated by affixing the seal of such State, Territory or Possession thereto.

The records and judicial proceedings of any court of any such State, Territory or Possession, or copies thereof, shall be proved or admitted in other courts within the United States and its Territories and Possessions by the attestation of the clerk and seal of the court annexed, if a seal exists, together with a certificate of a judge of the court that the said attestation is in proper form.

Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.

LSA-R.S. 13:4231. Res Judicata .

Except as otherwise provided by law, a valid and final judgment is conclusive between the same parties, except on appeal or other direct review, to the following extent:

(1) If the judgment is in favor of the plaintiff, all causes of action existing at the time of final judgment arising

out of the transaction or occurrence that is the subject matter of the litigation are extinguished and merged in the judgment.

(2) If the final judgment is in favor of the defendant, all causes of action existing at the time of final judgment arising out of the transaction or occurrence that is the subject matter of the litigation are extinguished and the judgment bars a subsequent action on those causes of action.

(3) A judgment in a favor of either plaintiff or the defendant is conclusive, in any subsequent action between them, with respect to any issue actually litigated and determined if its determination was essential to that judgment.

STATEMENT OF THE CASE

Petitioners, Amy C. Kruger and St. Charles 1, L.L.C. ("Kruger") challenge the federal constitutionality of the provisions of LSA-R.S. 33:2740.40 that give three private, voluntary, dues paying organizations the power to directly or indirectly appoint 10 of 11 of the members of the Board of Commissioners of the Garden District Security District, a Louisiana state agency, and restrict membership in its Board to "real property" owners.

A. The Consequences of the Decision Below

The dismissal of the proceedings in the federal court system, first by the district court on the basis of lack of jurisdiction under the Tax Injunction Act and then by the court of ap-

peal on the basis of mootness born of an interlocutory preliminary injunction judgment since vacated, means that petitioners have been denied all relief in the federal courts including their appeal, meanwhile the GDSD Board, appointed under a statute facially unconstitutional[1] and so declared by one court, still operates unconstitutionally..

The court of appeals should not have dismissed petitioners' appeal as moot because of what it characterized as the state district court's "final judgment", *i.e.*, the declaration of the Orleans Parish Civil District Court that LSA-R.S. §33:2740.40(c) was unconstitutional in that court's order for preliminary injunction against the defendants, because it was not a final judgment and because the subsequently issued opinion of the Louisiana Supreme Court vacated that judgment, concluding "that when the trial court declared section 2740.38(C) unconstitutional, it went beyond the limited legal issues regarding the preliminary injunction that were before the court." (Opinion at 3, App. F, 28a.)

Had the court of appeals entertained the appeal, found it meritorious, and remanded the case, the federal district court would certainly not have been precluded from hearing the case due to principals of *res judicata* due to the "unconstitutionality" ruling of a Louisiana district court that has now been vacated.

B. Proceedings Below

The original complaint was filed on January 29, 1999. The district court *sua sponte* raised 28 U.S.C. § 1341, the Tax Injunction Act, as a bar to subject matter jurisdiction, *Kruger v.*

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[1] *Quinn v. Milsap*, 491 U.S. 95, 106-07 (1989)

Garden Dist. Ass'n, 1999 U.S. Dist. LEXIS 1482 (E.D. La. Feb. 2, 1999) (App. C). The parties briefed this issue.

Since the district court had tentatively concluded that it had no subject matter jurisdiction under TIA, petitioners filed suit in Louisiana state on March 23, 1999 urging the unconstitutionality of the statute as violating both the federal and state constitutions and urging the illegality of the actions of the defendants under Louisiana law.

The district court dismissed the complaint for lack of subject matter jurisdiction under TIA, *Kruger v. Garden Dist. Ass'n*, 1999 U.S. Dist. LEXIS 6985 (E.D. La. Apr. 30, 1999) (App. D). Kruger filed a motion for reconsideration that was based in part on the assertions made by the defendants in the Louisiana state court case that there was no adequate state remedy. This was denied in *Kruger v. Garden Dist. Ass'n*, 1999 U.S. Dist. LEXIS 7375 (E.D. La. May 12, 1999) (App. E). A timely notice of appeal was filed on May 17, 1999. The court of appeal had jurisdiction, pursuant to 28 U.S.C. § 1291, as a timely appeal from the final judgment of April 30, 1999 and the minute entry of May 12, 1999 denying the motion for reconsideration.

On September 10, 1999, during the appeal and after Kruger had filed her original brief in the court of appeal, the state district court declared the statute unconstitutional and preliminarily enjoined the operation of the GDSD (App. F). In Kruger's reply brief, she informed the court of appeal of this development and suggested that this decision, on account of its lack of finality, the available suspensive appeal without bond, and the inherent delays, was not final, and the appeal was not moot.

Sua sponte, without notice to the parties or an opportunity to respond, and in an unpublished decision, the Fifth Circuit dismissed the appeal, *Kruger v. Garden Dist. Ass'n*, 208 F.3d 1006; 2000 U.S. App. LEXIS 2616 (5th Cir. La. Jan. 20, 2000) (App. A), on the basis of mootness born of the Louisiana district court judgment. Concerned that the contentions made by the defendants to the Louisiana Supreme Court, that the September 10, 1999 judgment and declaration of unconstitutionality exceeded the jurisdiction of the district court, would leave petitioners without an immediate or effective remedy in any court, Kruger urged the court of appeal to rehear the matter or to maintain jurisdiction until the decision of the Louisiana Supreme Court. However, rehearing was denied on March 2, 2000 (App. B), the day on which the appeal in the Louisiana Supreme Court was argued.

On March 24, 2000, the Louisiana Supreme Court (99-3344 (La. 03/24/00); 2000 La. LEXIS 765, App. G) held that the district court had exceeded her authority, vacated her judgment, and remanded the appeal to the Louisiana Fourth Circuit Court of Appeal for an expedited hearing that had not yet been set.

REASONS FOR GRANTING THE WRIT

THE DECISION OF THE COURT OF APPEALS CONFLICTS WITH DECISIONS OF THIS COURT AND THE DECISIONS OF OTHER CIRCUIT COURTS OF APPEAL

I. The Appeal Was Not Moot Because the State Court Judgment Was Not Final Under Louisiana Law

In declaring that the judgment of the Louisiana district court was a final judgment for *res judicata* purposes,[2] the court of appeal failed to adhere to the well settled precedent of this Court that requires that "a federal court must give to a state-court judgment the same preclusive effect as would be given that judgment under the law of the State in which the judgment was rendered." *Migra v. Warren City School District Board of Education*. 465 U.S. 75, 80; 104 S. Ct. 892, 896; 79 L. Ed. 2d 56 (1984); *Marrese v. American Academy of Orthopaedic Surgeons*, 470 U.S. 373, 381; 105 S. Ct. 1327, 1332; 84 L. Ed. 2d 274 (1985) (". . . § 1738 requires a federal court to look first to state preclusion law in determining the preclusive effects of a state court judgment." "More importantly, we have parallel systems of state and federal courts, and the concerns of comity reflected in § 1738 generally allow States to determine the preclusive scope of their own courts' judgments." *Id.*, 470 U.S. at

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[2] Specifically, the Fifth Circuit held that they could not reach the merits of the district court's dismissal because "a state court judgment involving the same 'nucleus of operative facts' as the current case has been entered in Kruger's favor since the time of dismissal, thus rendering the current appeal moot." Opinion, at 2, App. A.

385; 105 S. Ct. at 1334); *First Alabama Bank of Montgomery, N.A., v. Parsons Steel, Inc.*, 825 F.2d 1475, 1480 (11th Cir. 1987) (referencing Alabama law under which "res judicata and collateral estoppel principles do not apply until there is a final judgment rendered on the merits of the case."); *Gosnell v. City of Troy*, 59 F.3d 654, 657 (7th Cir. 1995) ("For our purposes, what matters is that a remand deprives the judgment of preclusive effect [under Illinois law] until a new final judgment has been entered."); *E.B. Harper and Co. v. Nortek, Inc.*, 104 F.3d 913, 921 (7th Cir. 1997); *American National Bank and Trust Co. v. Regional Transportation Authority*, 125 F.3d 420, 430; (7th Cir. 1997); *Aguillard v. McGowen*, 207 F.3d 226, 227, see also 229 (5th Cir. 2000) ("Because the state court of appeals reversed McGowen's criminal conviction on appeal, we vacate and remand for a new trial on the merits."). "When the appellate court reverses a judgment, the finality necessary for claim or issue preclusion is eliminated." *Lulirama Ltd., Inc. v. Axcess Broadcast Servs., Inc.*, 128 F.3d 872, 876 (5th Cir. 1997)

Under Louisiana law, to which reference should have been made, a judgment must be valid and final before it is "conclusive between the same parties. . . " LSA-R.S. 13:4231. This means, according to the 1990 revision comment, that:

> The judgment must also be a final judgment, that is, a judgment that disposes of the merits in whole or in part. The use of the phrase "final judgment" also means that the preclusive effect of a judgment attaches once a final judgment has been signed by the trial court and would bar any action filed thereafter unless the judgment is reversed on appeal.

An apt example is contained in *Davis v. Gleneagle Ship Management Co.*, 1997 U.S. Dist. LEXIS 14702, *8; 1998 AMC 656 (E.D. La. 1997) in which the federal district court

was able to dismiss a complaint for lack of personal jurisdiction in controversion of the state district court, "Because the order of the Civil District Court for the Parish of Orleans is still appealable, it is not yet final." "Even though a lower court has adjudicated a claim and rendered judgment, the claim continues to be pending until appeal of that judgment has been exhausted." *Segura v. Frank*, 630 So.2d 714, 727 (La. 1994). See the further explication of the concept in Louisiana of a "pending" lawsuit at 630 So.2d at 726-28.

Moreover, the judgment of the state district court was in the form of a preliminary injunction issued solely on the basis of affidavits. Preliminary injunctions are "designed merely to afford temporary relief (usually, to preserve the status quo) "[d]uring the pendency of an action." La. C.C.P. Art. 3601, so that there may be a trial on the permanent injunction or other relief sought by a principal demand, *Smith v. West Virginia Oil and Gas*, 373 So.2d 488, 491, n. 3 (La. 1979), and "even though the hearing on the summary proceedings to obtain the preliminary injunction may touch upon or tentatively decide merit-issues." *Id.*, at 494 (such a case had to be remanded for trial on the merits).

The court of appeal also violated the settled principle that it had an "unflagging" duty to exercise its jurisdiction when properly called upon to do so. *Colorado River Water Conservation District v. United States*, 424 U.S. 800, 813; 47 L. Ed.2d 483, 96 S.Ct. 1236 (1976). In parallel actions, the balance should be "heavily weighted in favor of the exercise of jurisdiction." *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1, 16, 74 L.Ed.2d 765, 103 S.Ct. 927 (1983).

II. The Authorities Cited by the Court of Appeal in Its Opinion Do Not Support Its Dismissal of the Appeal

While the court of appeal correctly stated that in order for res judicata to apply and for it to be able to provide no further relief, "the prior action must have concluded with a final judgment on the merits," (App. A., 3a), it simply assumed that the Louisiana district court had rendered a final judgment. None of the authority cited by the court of appeal considers the issue of finality. *United States v. Shanbaum,* 10 F.3d 305, 310 (5th Cir. 1994). (a prior tax court judgment, through by consent was final and eliminated "innocent spouse" as a defense); *McClelland v. Gronwaldt*, 155 F.3d 507, 514 (5th Cir. 1998) (the action sought to be enjoined had already been completed); *Pacific. Ins. Co. v. General Dev. Corn.*, 28 F.3d 1093, 1096 (11th Cir. 1994) (the conviction of the insureds made moot the appeal of an order to have their civil defense costs paid); *Sullivan Cent. Plaza 1, Ltd. v. BancBoston Real Estate Capital Cog. (In re Sullivan Cent. Plaza, I, Ltd.*, 914 F.2d 731, 733-34 (5th Cir.1990) (an appeal of a bankruptcy court decision without a stay is moot when the property has been sold); *NLRB v. O.E. Szekely & Assocs.. Inc.*, 259 F.2d 652, 654 (5th Cir. 1958) (the motion to dismiss as moot was denied).

III. When a Court of Appeal Dismisses an Appeal as Moot for Reasons Beyond the Control of the Appellant, It Should Remand to the District Court with Instruction to Vacate the Underlying Judgment

The court of appeal, in dismissing the appeal *sua sponte* and in failing to remand for vacatur by the district court of the judgment appealed from, acted contrary to the well-settled law of this Court and that of many other circuits. *Great W. Sugar Co. v. Nelson*, 442 U.S. 92, 93-94, 99 S. Ct. 2149, 2149, 60 L. Ed. 2d 735, 736 (1979) (and cases therein cited); *United States*

v. Munsingwear, 340 U.S. 36, 39-41 & n.2, 71 S. Ct. 104, 106-107 & n.2, 95 L. Ed. 36, 40-42 & n.2 (1950); *U. S. Bancorp Mortgage Company v. Bonner Mall Partnership*, 513 U.S. 18, 25, n. 3; 115 S. Ct. 386, 392; 130 L. Ed. 2d 233 (1994) ("We thus stand by *Munsingwear's* dictum that mootness by happenstance provides sufficient reason to vacate.") See *Knaust v. The City of Kingston, New York*, 157 F.3d 86, 89-90 (2d Cir. 1998); *Penguin Books USA, Inc. v. Walsh*, 929 F.2d 69, 73 (2d Cir. 1991); *In Re: Highway Truck Drivers & Helpers Local Union # 107*, 888 F.2d 293 and text at n. 9 (3d Cir. 1989) (reversal by a state supreme court made the judgment appealed from moot); *Commodity Futures Trading Commission v. Board of Trade of the City of Chicago*, 701 F.2d 653, 656-57 (7th Cir. 1983) ("The reason for vacating a lower court's decision when the case becomes moot pending appeal is to make sure that a decision of which the losing party was denied appellate review will not have preclusive effect in subsequent litigation between the parties."); *Harris v. Board of Governors of the Federal Reserve System*, 938 F.2d 720, 723-24 (7th Cir. 1991) (to prevent preclusive effect); *Key Enterprises of Delaware v. Venice Hospital*, 9 F.3d 893, 899-900 (11th Cir. 1993); *Aviation Enterprises, Inc. v. Orr*, 716 F.2d 1403, 1407-1408 and particularly authorities cited at n. 35 (D.C. Cir. 1983).

CONCLUSION

Plaintiffs, who have brought a meritorious suit to declare the unconstitutionality of a Louisiana law that clearly violated constitutional principles, have received no effective relief in the state courts and have been spurned by the federal courts, first on the basis of a statute of questionable application, and then on account of their very success, however ephemeral, in the Louisiana district court. Even when the procedural prob-

lems and possible vacation of the state district court's judgment was brought to the attention of the court of appeal on rehearing, no relief was granted. Rather costs were assessed against petitioners.

Petitioners are confronted with a judgment in the federal district court that has not been vacated and has the potential for preclusive effect, even though it was appealed, not reviewed on appeal, and the appeal was dismissed for reasons beyond the control of petitioners.

The petition should be granted.

LAW OFFICES OF LOUIS R. KOERNER, JR.

By: _____

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APPENDIX A – OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT DATED AND FILED JANUARY 20, 2000

FILED JAN 20 2000

U. S. COURT OF APPEALS
IN THE UNITED STATES COURT OF APPEALS

CHARLES R. FULBRUGE III, CLERK

FOR THE FIFTH CIRCUIT

No. 99-3051
Summary Calendar

AMY C. KRUGER; ST. CHARLES 1, LLC,
Plaintiffs-Appellants,

versus

THE GARDEN DISTRICT ASSOCIATION; THE GARDEN DISTRICT'S SECURITY DISTRICT, also known as The Garden District's Security Special Taxing District; THE CITY OF NEW ORLEANS; BETTY JEFFERSON, in her official capacity as the Assessor for the Fourth District, City of New Orleans; THE STATE OF LOUISIANA, and the individual members of the Garden District Security District; TONY GELDERMAN, President; EDWARD F. LEBRETON, III, Vice-President; KRISTI KENDRICK, Secretary; WILLIAM TRUFANT, Treasurer, and members; KIRK DOMINGOS; PAUL M. HAYGOOD; MEL LEGARDE; ROMELL MADISON; WILLIAM OLIVER; WARREN WATTERS; NANCY WATTSSNYDER, in their official capacities; THE MAGAZINE STREET MERCHANTS ASSOCIATION; THE ST. CHARLES AVENUE ASSOCIATION; MARC MORIAL, The Honorable Mayor of the City of New Orleans in his offi-

cial capacity; DIANA BAJOIE, The Honorable, in her official capacity; RENEE GILL PRATT, The Honorable, in her official capacity,

Defendants-Appellees.

Appeal from the United States District Court for the Eastern District of New Orleans

(USDC No. 99-CV-323-K)

Before REAVLEY, SMITH and DENNIS, Circuit Judges.

[2]PER CURIAM:*

Appealing from a dismissal for lack of jurisdiction, Amy C. Kruger ("Kruger") argues that the Tax Injunction Act, 28 U.S. C. § 1341, does not bar a federal court from determining her constitutional claims against the Garden District Association ("the GDA"), the Garden District Security District ("GDSD"), the City of New Orleans, and various individuals associated with these organizations. Kruger contends that LA. REV. STAT. ANN. § 33:2740.40(C), which provides the mechanism for selecting the board of the GDSD, violates the Equal Protection Clause of both the United States and Louisiana Constitutions. We do not reach the merits of whether the district court properly dismissed Kruger's suit, however, because a state

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*Pursuant to 5TH CIR. R. 47.5, the Court has determined that this opinion should not be published and is not precedent except under limited circumstances set forth in 5TH CIR. R. 47.5.4.

court final judgment involving the same "nucleus of operative facts" as the current case has been entered in Kruger's favor since the time of dismissal, thus rendering the current appeal moot.

If we were to reverse the dismissal and remand for a trial on the merits, the district court would necessarily rule that Kruger's claims are barred by res judicata. Four conditions must be met for res judicata to apply: (1) the parties in a later action must be identical to (or at least be in privity with) the parties in a prior action; (2) the judgment in the prior action must have been rendered by a court of competent jurisdiction; (3) the prior action must have concluded with a final judgment on the merits; (4) the same claim [3] or cause of action must be involved in both suits. United States v. Shanbaum, 10 F.3d 305, 310 (5th Cir. 1994). All of these elements have been met in this case. Thus, the current appeal is moot as any remand to the district court would be a futile gesture. See McClelland v. Gronwaldt, 155 F.3d 507, 514 (5th Cir. 1998) ("[a] case is moot when it no longer presents a live controversy with respect to which the court can give meaningful relief.") (quoting Pacific. Ins. Co. v. General Dev. Corn., 28 F.3d 1093, 1096 (11th Cir. 1994)); Sullivan Cent. Plaza 1, Ltd. v. BancBoston Real Estate Capital Cog. (In re Sullivan Cent. Plaza, I, Ltd., 914 F.2d 731, 733-34 (5th Cir.1990) ("The mootness doctrine is grounded primarily and originally in the appellate court's inability to fashion relief"); NLRB v. O.E. Szekely & Assocs., Inc., 259 F.2d 652, 654 (5th Cir. 1958) ("if, pending an appeal an event occurs which renders it impossible for [an] appellate court to grant any relief or renders a decision unnecessary, the appeal will be dismissed as moot.").

Kruger contends that the current appeal is not moot because the federal forum provides certain procedural advantages that Louisiana state court does not. It must be pointed out,

however, that Kruger chose to bring her action in state court, and, in any event, the perceived procedural advantages of federal court do not overcome the bar of res judicata.

APPEAL DISMISSED.

APPENDIX B – ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT DATED AND FILED MARCH 2, 2000 DENYING PETITION FOR REHEARING

U. S. COURT OF APPEALS

FILED MAR 2 2000

IN THE UNITED STATES COURT OF APPEALS

CHARLES R. FULBRUGE III, CLERK

FOR THE FIFTH CIRCUIT

No. 99-3051

AMY C. KRUGER; ST. CHARLES 1, LLC,
Plaintiffs-Appellants,

versus

THE GARDEN DISTRICT ASSOCIATION; THE GARDEN DISTRICT'S SECURITY DISTRICT, also known as The Garden District's Security Special Taxing District; THE CITY OF NEW ORLEANS; BETTY JEFFERSON, in her official capacity as the Assessor for the Fourth District, City of New Orleans; THE STATE OF LOUISIANA, and the individual members of the Garden District Security District; TONY GELDERMAN, President; EDWARD F. LEBRETON, III, Vice-President; KRISTI KENDRICK, Secretary; WILLIAM TRUFANT, Treasurer, and members; KIRK DOMINGOS; PAUL M. HAYGOOD; MEL LEGARDE; ROMELL MADISON; WILLIAM OLIVER; WARREN WATTERS; NANCY WATTSSNYDER, in their official capacities; THE MAGAZINE STREET MERCHANTS ASSOCIATION; THE ST. CHARLES AVENUE ASSOCIATION; MARC MORIAL, The Honorable Mayor of the City of New Orleans in his offi-

cial capacity; DIANA BAJOIE, The Honorable, in her official capacity; RENEE GILL PRATT, The Honorable, in her official capacity,

Defendants-Appellees.

Appeal from the United States District Court for the Eastern District of New Orleans

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ON PETITION FOR REHEARING

Before REAVLEY, SMITH and DENNIS, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above case is denied.

ENTERED FOR THE COURT:
/s/THOMAS M. REAVLEY
United States Circuit Judge
CLERK'S NOTE: SEE FRAP AND LOCAL RULES 41 FOR STAY OF THE MANDATE

APPENDIX C – MINUTE ENTRY OF THE UNITED STATES DISTRICT COURT, DATED FEBRUARY 2, 1999 AND ENTERED ON FEBRUARY 3, 1999

AMY KRUGER AND ST. CHARLES 1, LLC VERSUS THE GARDEN DISTRICT ASSOCIATION, ET AL

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF LOUISIANA

1999 U.S. Dist. LEXIS 1482

February 2, 1999, Decided
February 2, 1999, Filed; February 3, 1999, Entered

DISPOSITION: [*1] Motion for Entry of Temporary Restraining Order and to set Hearing on Motion for Preliminary Injunction DENIED.

JUDGES: Stanwood R. Duval, Jr, Judge.

OPINION: On this day was held a status conference to discuss plaintiffs' Motion for Entry of Temporary Restraining Order and to Set Hearing on Motion for Preliminary Injunction and plaintiffs' Verified Complaint for Declaratory Judgment and For Preliminary and Permanent Injunction -- Jury Demand. In attendance were:

Bill Ridlon of Law Offices of Louis Koerner, for plaintiffs;
Anthony Gelderman, President of the Garden District's Security District ("GDSD");
Kristine B. Kendrick, Secretary of the GDSD;
Edward LeBreton, Vice-President of the GDSD;
Shelly Landrieu of the Garden District Association (GDA);
Shaun Rafferty of the GDA;

Angie Laplace of the Louisiana State Attorney General's Office;
Deborah Wilson of the City of New Orleans; and
Ed Washington of the City of New Orleans.

Based on the discussion that ensued:

IT IS ORDERED that [*2] the Motion for Entry of Temporary Restraining Order and to Set Hearing on Motion for Preliminary Injunction is hereby DENIED. The court is uncertain that it will ultimately have jurisdiction to hear this case, as 28 U.S.C. § 1341 ("The Tax Injunction Act") may apply. The parties were unable to demonstrate to the court at the conference any reason why the Tax Injunction Act would not apply in this case. A temporary restraining order is an extreme measure to take when the court is uncertain of jurisdiction, as here. Additionally, as the contract to expend the funds in question will not be in effect until March, there will be no irreparable harm to plaintiffs if the TRO is not granted, as was ultimately conceded by counsel for plaintiffs at the conference.

In order to consider the Declaratory Judgment and Preliminary/Permanent Injunction Motions on their merits, the court needs to take under submission argument on the applicability of 28 U.S.C. § 1341. Accordingly,

IT IS FURTHER ORDERED that if plaintiffs wish to proceed with their case in federal court, plaintiffs shall file with this court a memorandum explaining why § 1341 is not applicable to this case by Friday, [*3] February 12, 1999 at 12:00 noon. If plaintiffs determine that § 1341 is applicable, and that the case should therefore be refiled in state court, plaintiffs need not file such a memorandum but instead shall apprise the

court of their decision by 12:00 noon on February 12, 1999. If plaintiffs have not filed a brief by February 12, this court will dismiss the case without prejudice.

Should plaintiffs timely file a brief, defendants shall file any opposition to that brief by Wednesday, February 24, 1999 at 12:00 noon. The court will after that time decide whether it has jurisdiction over this case. Should the court determine that it does have jurisdiction, it will set plaintiffs' motions for declaratory judgment, preliminary injunction, and permanent injunction for hearing after ruling on the jurisdictional issue.

Stanwood R. Duval, Jr, Judge

APPENDIX D – OPINION AND FINAL JUDGMENT OF THE UNITED STATES DISTRICT COURT DATED AND ENTERED ON APRIL 30, 1999

AMY KRUGER AND ST. CHARLES 1, LLC VERSUS THE GARDEN DISTRICT ASSOCIATION, ET AL

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF LOUISIANA

1999 U.S. Dist. LEXIS 6985

April 30, 1999, Decided
April 30, 1999, Filed; April 30, 1999, Entered

DISPOSITION: [*1] Case DISMISSED for lack of subject matter jurisdiction.

JUDGES: Stanwood R. Duval, Jr., Judge.

OPINION: BACKGROUND

This case was brought as a complaint for declaratory judgment and for a preliminary and permanent injunction by a resident of the Garden District, and by an LCC that is a property owner in the Garden District. The Garden District is a neighborhood in New Orleans, with boundaries at Carondelet Street, Jackson Avenue, Magazine Street, and Louisiana Avenue. Plaintiffs have brought suit against, inter alia, [*2] the Garden District Association (the "GDA"), the Garden District Security District ("the GDSD"), the City of New Orleans, and various individuals associated with these organizations. The suit challenges certain provisions of Louisiana Revised Statute

33:2740.40,[1] the statute that creates the GDSD, "for the primary object and purpose of promoting and encouraging the security of the Garden District" and provides for the levying of ad valorem property taxes to finance enhanced security. LSA-R.S. 33:2740.40(B), (F). n1 Specifically, the suit challenges Section C of the statute, which provides a mechanism for selecting the GDSD Board:

In order for the orderly development and effectuation of the services to be furnished by the district and to provide for the representation in the affairs of the district of those persons and interests immediately concerned with and affected by the purposes and development of the area, the affairs of the district shall be managed by the district's board of directors, hereinafter referred to as the "board". The board shall consist of eleven members as follows:

(a) The president of the Garden District Association shall be a member.

(b) The board of [*3] directors of the Garden District Association shall appoint five members.

(c) The board of directors of the Magazine Street Merchants Association shall appoint one member.

(d) The board of directors of the St. Charles Avenue Association shall appoint one member.

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[1]The complaint actually names LSA-R.S. 33:2740.38, the legislation enacting the Lake Willow Subdivision Improvement District, but it is clear from the complaint that plaintiffs meant to challenge LSA-R.S. 33:2740.40.

(e) The mayor shall appoint one member to the board.

(f) The state representative whose representative district is defined in R.S. 24:35.4(A)(91) shall appoint one member from a list of nominations submitted by the Garden District Association.

(g) The state senator whose senatorial district is defined in R.S. 24:35(5) shall appoint one member from a list of nominations submitted by the Garden District Association.

(2) Appointees to the board shall be both residents and real property owners within the district.

33:2740.40(C).

Plaintiffs object to the statute's requirement that members of the board be property owners in the Garden District and also to the statute's setting aside eight of the eleven board positions to members of the Garden District Association, which charges an annual fee for membership, and which excludes residents of Carondelet street from membership. Plaintiffs allege that they have been excluded [*4] from appointment to the board of the GDSD because they cannot afford membership in the GDA and/or because they are not property owners. Plaintiffs claim that these aspects of the statute violate the Equal Protection clauses of the United States Constitution and the Louisiana Constitution because "the interposition of the GDA in the appointment process is tantamount to the requirement of a qualifying fee or a poll tax." Complaint at 9, P 22. The Complaint

also alleges that the statute is unconstitutionally vague and violative of 42 U.S.C. § 1983.

THE TAX INJUNCTION ACT

Because it was concerned about the applicability of the Tax Injunction Act, 28 U.S.C. § 1341 ("the TIA"), this court ordered the parties to submit briefs on that subject. Having considered the briefs and its own research, [*5] the court concludes that the Tax Injunction Act precludes it from hearing this case.

The Tax Injunction Act reads as follows:

The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State.

28 U.S.C. § 1341.

The TIA represents a "policy of restraint" in the federal courts. *Folio v. City of Clarksburg, West Virginia*, 134 F.3d 1211, 1214 (4th Cir. 1998), citing *Tully v. Griffin, Inc.*, 429 U.S. 68, 73, 97 S. Ct. 219, 222, 50 L. Ed. 2d 227 (1976). Federal courts are "under an equitable duty to refrain from interfering with a State's collection of its revenue" in light of "the imperative need of a State to administer its own fiscal operations." Id. Deciding whether to apply the TIA is not a matter of discretion for the court. The TIA creates a "non-waivable jurisdictional bar that absolutely precludes federal courts from assessing the validity of state or local taxation schemes. See *Keleher v. New England Tel. & Tel. Co.*, 947 F.2d 547, 549 (2d Cir. 1991); see also *Hardwick v. Cuomo*, 891 F.2d 1097, 1103-04 (3d Cir. [*6] 1989).

Courts undergo a two-part analysis to determine whether the Tax Injunction Act bars federal jurisdiction in a given case. *Home Builders Association of Mississippi, Inc. v. City of Madison, Mississippi*, 143 F.3d 1006, 1010 (5th Cir. 1998). First, a court determines whether the law in question imposes a tax or merely a regulatory fee. Id. What constitutes a "tax" for purposes of the Tax Injunction Act is a question of federal law. See *Id.* at n. 10, (citing *Ben Oehrleins, Inc. v. Hennepin Cty.*, 115 F.3d 1372, 1382 (8th Cir. 1997)). Second, even if the law does impose a "tax" for purposes of the Act, a district court must still decline to exercise jurisdiction if the state court is equipped to furnish the plaintiffs with a plain, speedy, and efficient remedy. See 143 F.3d at 1010 (citing *Cumberland Farms, Inc. v. Tax Assessor, State of Maine*, 116 F.3d 943, 945 (1st Cir. 1997), *Collins Holding Corp. v. Jasper Cty., South Carolina*, 123 F.3d 797, 799 (4th Cir. 1997)). The court will apply each prong of the test in turn to the case at hand.

1. ARE PLAINTIFFS CHALLENGING A TAX?

The court must first consider whether the statute operates as a tax, in which [*7] case the court may not exercise jurisdiction, or merely a fee, in which case the court has jurisdiction. The term "tax" should be construed broadly, given Congress's goals in promulgating the Tax Injunction Act, which included preventing federal-based delays in the collection of public revenues by state and local governments. *See Tramel v. Schrader*, 505 F.2d 1310 (5th Cir. 1975). Courts distinguish between a tax and a fee by looking to a statute's function and its source:

> Distinguishing a tax from a fee often is a difficult task. Indeed, the line between a 'tax' and a 'fee' can be a

> blurry one. Workable distinctions emerge from the relevant case law, however: the classic tax sustains the essential flow of revenue to the government, while the classic fee is linked to some regulatory scheme. The classic tax is imposed by a state or municipal legislature, while the classic fee is imposed by an agency upon those it regulates. The classic tax is designed to provide a benefit for the entire community, while the classic fee is designed to raise money to help defray an agency's regulatory expenses.

Home Builders, 143 F.3d at 1010 (citations omitted)

The statute in question [*8] here involves a "classic tax" and not a fee. The statute authorizes the collection of a tax on all property owners within the district, sustaining the "essential flow of revenue to the government." The tax was imposed by the state legislature and not by an agency. And the tax aims to provide a benefit for the entire community, by increasing security in the neighborhood.

It is also clear from a reading of plaintiffs' Complaint that the statute imposes a "tax" within the scope of the Tax Injunction Act. The prayer for relief in plaintiffs' Compliant seeks judgment as follows:

1. Declaring that LSA-R.S. 33:2740.38 (sic) is unconstitutional as violative of the equal protection provisions of the Constitutions of the United States and Louisiana.

2. Declaring that LSA-R.S. 33:2740.38 (sic) establishes arbitrary and capricious discriminations between citizens that deny them the equal pro-

tection of the laws and is an arbitrary and discriminatory tax;

3. Declaring that the actions of the defendants have violated the civil rights law of the United States, the constitutional guarantees of their rights under the Constitution of the State of Louisiana, and the laws of Louisiana, [*9] for injunctive relief against a continuance of these actions, and for reasonable attorney's fees;

4. For temporary and permanent injunctive relief against the actions of the defendants in implementing these unconstitutional laws and policies, collecting the tax, and disbursing collected funds, and a declaration of the illegality of those said actions;

5. for all just and equitable relief;

6. for trial by jury.

Complaint at 16, emphasis added.

The relief sought from the court, then, is an injunction on the collecting and disbursement of taxes. Plaintiffs contend that their complaint can be easily amended to remove the language in paragraph four, and that, as amended, the TIA would no long apply. The court disagrees. The question is not whether the complaint specifically calls for an injunction on the collection of taxes and the disbursement of monies, but whether the relief sought by the complaint would effectively result in the cessation of tax collecting and spending. Even if

plaintiffs' complaint were amended to remove any reference to taxes, the complaint would still seek to declare the method of choosing the board of the GDSD unconstitutional, and such [*10] a declaration would require the GDSD to immediately cease collecting taxes or spending the revenues. In such situations, federal courts have held that the TIA precludes them from exercising jurisdiction. For example, where an injunction would not expressly enjoin the collecting of a tax, but would "restrain assessment" of state taxes, "the fact that the injunction would restrain assessment indirectly rather than directly does not make the Tax Injunction Act inapplicable." *Blangeres v. Burlington Northern, Inc.*, 872 F.2d 327 (9th Cir. 1989), see also *Sipe v. Amerada Hess Corp.*, 689 F.2d 396, 404 (3d Cir. 1982) (TIA can apply even to actions between two private parties where result is a restraint on assessment).

Not only would the result of any injunction issued by this court be a restraint on the collection and disbursement of taxes, this courts' analysis of whether the makeup the GDSD was unconstitutional would effectively be an evaluation of the constitutionality of a tax scheme. Here, the alleged harm to plaintiffs is essentially that the GDSD is enforcing a regime of "taxation without representation," whereby property owners in the GDA are taxed by the GDSD but cannot sit [*11] on the board of the GDSD unless they pay a fee to join the GDA. Even without the language enjoining tax collection, then, this court would still have to consider the constitutionality of the tax collection when it considered whether the mechanism behind the collection violated equal protection and/or was overly vague. Amending the complaint cannot strip it of its jurisdictional infirmities, as the very nature of the complaint is to challenge a tax.

2. IS THE STATE REMEDY ADEQUATE?

Once it has determined that the statute imposes a tax and not a fee, the court may not exercise jurisdiction if there is available to plaintiffs a "plain, speedy and efficient remedy in the courts of the state." 28 U.S.C. § 1341. In making this determination, the court must consider whether the state remedy "provides the taxpayer with a 'full hearing and judicial determination' at which she may raise any and all constitutional objections to the tax." *Folio v. City of Clarksburg, West Virginia*, 134 F.3d 1211, 1214 (4th Cir. 1998), (citing *Rosewell v. LaSalle Nat'l Bank*, 450 U.S. 503, 512, 101 S. Ct. 1221, 1229, 67 L. Ed. 2d 464 (1981)). In other words, the state court must provide a procedural [*12] vehicle that affords taxpayers the opportunity to raise their federal constitutional claims. *See Home Builder's*, 143 F.3d at 1012; *Smith v. Travis County Education District*, 968 F.2d 453, 456 (5th Cir. 1992). The state's remedy is therefore adequate if it provides taxpayers with a "complete judicial determination that is ultimately reviewable in the United States Supreme Court." Id. This circuit has emphasized that the state remedy "need not be the best remedy. It need only be adequate." *Alnoa G. Corp. v. City of Houston*, 563 F.2d 769, 772 (5th Cir. 1977).

Here, plaintiffs can clearly seek an adequate remedy in the state court. In fact, they have brought a simultaneous suit in state court which is now pending. Article 1872 of the Louisiana Code of Civil Procedure provides that a person "whose rights . . . are affected by a statute . . . may have determined any question of construction or validity arising under the . . . statute . . . and obtain a declaration of rights . . . thereunder." Article 1871 expressly provides for a declaratory action to determine a party's rights. Together, these provisions specifically authorize declaratory actions to determine the validity [*13]

and constitutionality of a state statute. See *Archer Daniels Midland v. McNamara*, 544 F. Supp. 99 (M.D. La. 1982).

Because plaintiffs have challenged a "tax" within the meaning of the Tax Injunction Act, and because there is a "plain, speedy, and efficient" remedy available in state court, the TIA precludes this court from exercising jurisdiction over this case.

Accordingly,

IT IS ORDERED that this case be hereby DISMISSED for lack of subject matter jurisdiction.

Stanwood R. Duval, Jr., Judge

APPENDIX E – MINUTE ENTRY AND ORDER DENYING RECONSIDERATION OF THE UNITED STATES DISTRICT COURT DATED MAY 12, 1999 AND ENTERED ON MAY 14, 1999

AMY KRUGER AND ST. CHARLES 1, LLC VERSUS THE GARDEN DISTRICT ASSOCIATION, ET AL

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF LOUISIANA

1999 U.S. Dist. LEXIS 7375
May 12, 1999, Decided
May 13, 1999, Filed; May 14, 1999, Entered

DISPOSITION: [*1] Motion to File Brief in Excess of 25 Pages GRANTED. Plaintiffs' Motion for Reconsideration and/or for Retention of Jurisdiction and Alternative Motion to Enter Final Judgment GRANTED in part and DENIED in part. Motion or Oral Argument DENIED.

JUDGES: Stanwood R. Duval Jr.

OPINION: On April 30, 1999, this court issued an order dismissing the above-captioned case for lack of subject matter jurisdiction. On May 11, 1999, this court received an "Ex Parte Motion to File Memorandum in Excess of Twenty-five Pages," an "Ex Parte Motion for Oral Argument on the Motion for Reconsideration," [*2] and a "Motion for Reconsideration and/or For Retention of Jurisdiction and Alternative Motion to Enter Final Judgment," all filed by plaintiffs. The court has considered plaintiffs' motion and is prepared to rule, and finds that it

does not need to hear oral argument on the motion, nor does it need any additional briefing.

Plaintiffs' substantive motion requests that this court reconsider its minute entry of April 30, 1999 and vacate what the plaintiff calls this court's "purported dismissal" of that minute entry. In the alternative, plaintiffs request that the court enter a final judgment in accordance with Rule 58 in order that plaintiffs may appeal.

Plaintiffs motion is based on the erroneous belief that the court dismissed this case because defendants represented to the court that plaintiffs would have an adequate remedy under state law. Defendants have now argued in the pending state court proceeding that plaintiffs do not have standing to bring their case. Plaintiffs misapprehend both this court's ruling and the law of subject matter jurisdiction.

This court could not hear plaintiffs' case not because of any misrepresentation by defendants but because the Tax Injunction Act, [*3] 28 U.S.C. § 1341, prohibits district courts from enjoining, suspending or restraining the assessment, levy or collection of any tax under state law where a "plain, speedy and efficient remedy" may be had in state court. The TIA does not require the federal court to assess the merits of the case (e.g., whether a party has standing) before deciding whether it has jurisdiction over that case. Plaintiffs have essentially argued that because the defendants are defending the case in state court, and as part of that defense arguing that plaintiffs should not prevail, that they are attempting to deny plaintiffs the right to a "plain, speedy and efficient remedy." Plaintiffs are entitled to bring their case in state court, but they are not entitled to win if their case has no merit. If plaintiffs do not have standing in state court, that lack of standing does not negate the jurisdictional effects of the Tax Injunction Act on this

federal court. The court therefore declines the opportunity to reconsider its prior ruling, and a judgment dismissing plaintiffs' case for lack of subject matter jurisdiction will be entered forthwith. Accordingly,

IT IS ORDERED that the Motion to File Brief [*4] in Excess of 25 Pages is hereby GRANTED.

IT IS FURTHER ORDERED that plaintiffs' Motion for Reconsideration and/or for Retention of Jurisdiction and Alternative Motion to Enter Final Judgment is hereby GRANTED in part and DENIED in part: the Motion for Reconsideration is hereby DENIED; the Motion for Retention of Jurisdiction is hereby DENIED; and the Motion to Enter Final Judgment is hereby GRANTED.

IT IS FURTHER ORDERED that the Motion or Oral Argument is hereby DENIED.

Stanwood R. Duval Jr.

APPENDIX F – JUDGMENT AND REASONS FOR JUDGMENT OF THE CIVIL DISTRICT COURT FOR THE PARISH OF ORLEANS, STATE OF LOUISIANA, GRANTING A PRELIMINARY INJUNCTION DATED AND ENTERED ON SEPTEMBER 10, 1999.

CIVIL DISTRICT COURT FOR THE PARISH OF ORLEANS

STATE OF LOUISIANA

NO. 99-4685 DIVISION:"N" SECTION 8

Amy C. Kruger, Et Al.

Versus

The Garden District Association, Et Al.

FILED: _____ _____

DEPUTY CLERK

JUDGMENT

The above captioned matter came on for a hearing on Wednesday came for hearing on March 31, 1999.

Present were:

Louis R. Koerner, Jr. and William F. Ridlon, II, Attorneys for the plaintiffs, Amy Kruger and St. Charles 1, LLC;

John H. Ryan, Attorney for the defendant, Garden District Security District;

Edward Washington, Attorney for defendant, the City of New Orleans.

Charles Braud, Attorney for the Louisiana Attorney General's Office.

Several exceptions were filed to the petition for declaratory and/or injunctive relief. After extensive argument and multiple memoranda of law filed, based on the law and the evidence.

IT IS ORDERED, ADJUDGED AND DECREED that that the exceptions of insufficiency of service, lis pendens, no right of action, and no cause of action be and are hereby **Denied**.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that R.S. 33:2740.38 paragraph C be and it hereby declared unconstitutional.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that a preliminary injunction be issued prohibiting further action by the Garden District Security District until a properly constituted board can be adopted.

JUDGMENT, READ, RENDERED AND SIGNED in New Orleans, Louisiana, this 10th day of September, 1999.

/s/ ETHEL SIMMS JULIAN
ETHEL SIMMS JULIAN
Judge, Civil District Court

CIVIL DISTRICT COURT FOR THE PARISH OF ORLEANS

STATE OF LOUISIANA

NO. 99-4685 DIVISION:"N" SECTION 8

Amy C. Kruger, Et Al.

Versus

The Garden District Association, Et Al.

FILED: _____ _____

DEPUTY CLERK

REASONS FOR JUDGMENT

It is this court's opinion that R.S. 33:2740.38(C) [33:2740.40(C)] is unconstitutional in that this provision requires members of the Garden District Security District to be property owners and because it requires that the selection of all but three of the members of the eleven member board of directors be selected by the private Garden District Association or from a list provided by it.

This paragraph is unconstitutional in that it violates the equal protection provisions of the Constitutions of the United States and the State of Louisiana by denying representation to non property owners, non individual property owners, and non members of the Garden District Association.

Given the denial of fundamental rights, this improperly constituted board should not be allowed to continue

to act on behalf of the Garden District Security District and election should be called which allows all residents of the District an opportunity to represent the District on a board.

For the foregoing reasons, a preliminary injunction should be issued prohibiting further action by the Garden District Security District until a properly constituted board can be adopted.

/s/ ETHEL SIMMS JULIAN
ETHEL SIMMS JULIAN
Judge, Civil District Court

APPENDIX G – PER CURIAM OPINION OF THE SUPREME COURT OF LOUISIANA RENDERED AND ENTERED ON MARCH 24, 2000

AMY C. KRUGER AND ST. CHARLES 1, L.L.C. VERSUS THE GARDEN DISTRICT ASSOCIATION, ET AL.

99-CA-3344
SUPREME COURT OF LOUISIANA
99-3344 (La. 03/24/00); 2000 La. LEXIS 765
March 24, 2000, Decided
DISPOSITION: JUDGMENT VACATED IN PART AND TRANSFERRED TO THE COURT OF APPEAL FOR EXPEDITED APPELLATE REVIEW.

OPINION: [Pg 1] PER CURIAM *

On March 23, 1999, plaintiffs filed suit challenging the constitutionality of La. R.S. 33:2740.38.[2] Section 2740.38 created a security district for the Garden District area of uptown New Orleans. In order to administer the affairs of the security district, section 2740.38 provided for a board of directors consisting of eleven (11) members each of whom was required to own property in the district and reside in the district. Plaintiffs, who failed to qualify, alleged that the dual property ownership/residency requirement for board membership denied them equal protection of the law. They sought temporary as well as permanent injunctive relief, and [*2] a declaratory judgment holding section 2740.38 unconstitutional.

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[2]In 1999, the Louisiana State Law Institute redesignated the statute as La. R.S. 33:9092. For purposes of consistency, we will refer to the statute by its original designation of La. R.S. 33:2740.38.

The Orleans Parish Civil District Court denied plaintiffs' *request for a temporary restraining* order but set for hearing their motion for a preliminary injunction. At the hearing, the trial court ruled on various exceptions filed by [Pg 2] defendants and took the case under advisement as to the preliminary injunction. On September 14, 1999, the trial court rendered judgment granting plaintiffs' request for a preliminary injunction. However, the trial court's judgment went further, and held section 2740.38(C), the portion of the statute pertaining to the board's membership, unconstitutional. Defendants appealed to this Court. La. Const. art. V, § 5(D).

Upon review of the record in this matter, we conclude that when the trial court declared section 2740.38(C) [*3] unconstitutional, it went beyond the limited legal issues regarding the preliminary injunction that were before the court. The hearing conducted was a summary proceeding, the scope of which was limited to addressing plaintiffs' demand for a preliminary injunction as well as the various exceptions filed by defendants. However, the trial court's declaration of unconstitutionality was in effect a ruling on the merits of plaintiffs' petition for declaratory relief. While no great harm would necessarily come from resolving the constitutional issue coincident with a ruling on the preliminary injunction, the record is devoid of anything to suggest that the parties had agreed to try the declaratory action--an action designated by our Code of Civil Procedure as an ordinary proceeding--at the preliminary injunction hearing.

Additionally, with the exception of a few exhibits that plaintiffs offered into evidence, no other evidence was taken at the preliminary injunction hearing. At oral argument in this Court, counsel for plaintiffs expressed willingness to stipulate

to deciding the case on the current record without additional evidence. Counsel for defendants, who are objecting to the judgment [*4] declaring the statute unconstitutional, would not agree to having the constitutional issue resolved on the present record, and would not foreclose the possibility of offering evidence in [Pg 3] the trial court if given the opportunity to do so. That being the case, the constitutional issue is not ripe for determination.

Accordingly, we vacate that portion of the trial court's judgment that declared section 2740.38(C) unconstitutional. Having vacated the declaration of unconstitutionality, the only issue on appeal is the propriety vel non of the preliminary injunction. Appellate jurisdiction to decide that issue lies in the court of appeal. La. Const. art. V, § 10(A). Accordingly, we transfer this case to the court of appeal for expedited review as a timely filed appeal of the judgment granting the preliminary injunction.[3] During the pendency of the appeal in the court of appeal, the parties are at liberty to move in the trial court for a trial on the merits regarding the permanent injunction, and perhaps coincidently, the declaratory relief sought.

JUDGMENT VACATED IN PART AND TRANSFERRED TO THE COURT OF APPEAL FOR EXPEDITED APPELLATE REVIEW

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[3]Review of the judgment granting the preliminary injunction does not require a final determination on the merits of the constitutional issue. In order to obtain the preliminary injunction, plaintiffs were not required to prove the statute unconstitutional but rather to make a prima facie showing that they would prevail on the merits of the case. *General Motors Acceptance Corp. v. Daniels*, 377 So. 2d 346, 348 (La. 1979).

APPENDIX H – TEXT OF LSA-R.S. 33:2740.40

§2740.40.[4] The Garden District's Security District; creation, composition and powers; preparation of plans; levy of ad valorem tax

A. The Garden District's Security Special Taxing District, hereinafter referred to as the "district", is hereby created in Orleans Parish, and the boundaries of the district shall be that area bounded by and including both sides of Carondelet Street, Jackson Avenue, Magazine Street, and Louisiana Avenue.

B. The district is established for the primary object and purpose of promoting and encouraging the security of the Garden District.

C.(1) In order for the orderly development and effectuation of the services to be furnished by the district and to provide for the representation in the affairs of the district of those persons and interests immediately concerned with and affected by the purposes and development of the area, the affairs of the district shall be managed by the district's board of directors, hereinafter referred to as the "board". The board shall consist of eleven members as follows:

(a) The president of the Garden District Association shall be a member.

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[4] Act 86, First Extraordinary Session, 1998, enacted as R.S. 33:2740.38, and renumbered upon codification.

(b) The board of directors of the Garden District Association shall appoint five members.

(c) The board of directors of the Magazine Street Merchants Association shall appoint one member.

(d) The board of directors of the St. Charles Avenue Association shall appoint one member.

(e) The mayor shall appoint one member to the board.

(f) The state representative whose representative district is defined in R.S. 24:35.4(A)(91) shall appoint one member from a list of nominations submitted by the Garden District Association.

(g) The state senator whose senatorial district is defined in R.S. 24:35(5) shall appoint one member from a list of nominations submitted by the Garden District Association.

(2) Appointees to the board shall be both residents and real property owners within the district.

D.(1) The minute books and archives of the district shall be maintained by the board's secretary. The monies, funds, and accounts of the district shall be in the official custody of the board.

(2) The duties of the officers shall be fixed by bylaws adopted by the board. The board shall adopt such rules and regulations as it deems necessary or advisable for conducting its business affairs. It shall hold regular meetings as shall be provided for in the bylaws and may hold special meetings at such times and places within the district as may be prescribed in the bylaws.

(3) A majority of the members of the board shall constitute a quorum for the transaction of business. The board shall keep minutes of all meetings and shall make them available through the board's secretary to members of the district.

(4) The members of the board shall serve without compensation.

E.(1) The board shall prepare or cause to be prepared a plan or plans, such plan or plans and the plan provided for in Subsection F of this Section being hereinafter referred to collectively as the "plan", specifying the public improvements, facilities, and services proposed to be furnished, constructed, or acquired for the district, and it shall conduct such hearings, publish such notice with respect thereto, and disseminate such information as it, in the exercise of its sound discretion, may deem to be appropriate or advisable and in the public interest.

(2) Any plan shall include:

(a) An estimate of the annual and aggregate cost of acquiring, constructing, or providing the services, improvements, or facilities set forth therein.

(b) An estimate of the aggregate number of mills or fees required to be levied in each year on the taxable real property within the district in order to provide the funds required for the implementation or effectuation of the plan for furnishing the services specified and for capital improvements, or both.

F.(1) The city council of the city of New Orleans is hereby authorized to levy and collect the special taxes or fees, as authorized by the district, as hereinafter specifically provided for

a term not to exceed five years from and after the date the first tax or fee is levied pursuant to the provisions of this Section, in the same manner and at the same time as all other ad valorem taxes on property subject to taxation by the city are levied and collected, a special ad valorem tax not to exceed nineteen mills or fees upon all taxable real property situated within the boundaries of the Garden District's Security District.* The tax or fee herein authorized shall be levied and collected only after the question of its imposition has been submitted to and approved by a majority of the registered voters of the district voting on the question at a regularly scheduled election to be conducted in accordance with provisions of the Louisiana Election Code. No such tax or fee shall be levied until a plan requiring or requesting the levy of a tax or fee is finally and conclusively adopted in accordance with the procedures prescribed in this Section.

(2) The proceeds of said tax or fee shall be used solely and exclusively for the purpose and benefit of the district; however, the city may retain one percent of the amount collected as a collection fee. Said proceeds shall be paid over to the Board of Liquidation, City Debt, day by day as the same are collected and received by the appropriate officials of the city of New Orleans and maintained in a separate account. Said proceeds shall be paid out by the Board of Liquidation, City Debt, solely for the purposes herein provided upon warrants or drafts drawn on said Board of Liquidation, City Debt, by the appropriate officials of the city and the treasurer of the district.

G. The board of commissioners shall adopt an annual budget in accordance with the Louisiana Local Government Budget Act, R.S. 39:1301 et seq. The district shall be subject to audit by the legislative auditor pursuant to R.S. 24:513.

H. Notwithstanding any other provision of this Section to the contrary, no tax or fee authorized herein shall be levied until the maximum amount of the tax has been approved by a majority of the registered voters of the district voting on the question at a regularly scheduled election to be conducted in accordance with provisions of the Louisiana Election Code.

I. The district shall have the power to acquire, to lease, to insure, and to sell real property within its boundaries in accordance with its plans.

J. The district may enter into a contract with the New Orleans Police Department or with a private security company which has been certified by the superintendent of the New Orleans Police Department for the provision of security patrols in the district.